SK B&T Pte Ltd v The owners of the ship or vessel 'Silver Moon' of Port Klang (No 3)

HIGH COURT (KUALA LUMPUR) — ADMIRALTY IN REM NO WA-27NCC-14–02 OF 2016
AZIZAH NAWAWI J
30 NOVEMBER 2016

Civil Procedure — Admiralty — Warrant of arrest — Court granted warrant of arrest in favour of plaintiff against defendant's vessel — Defendant sought court's order for writ in rem and warrant of arrest be struck out pursuant to O 19 r 1 and 92 r 4 of the Rules of Court 2012 ('the ROC') — Whether subject matter of action fell within the admiralty jurisdiction of court — Whether plaintiff may file writ and secure arrest of vessel — Whether there was requirement for plaintiff to serve statement of claim — Whether defendant could invoke O 19 r 1 of the ROC — Courts of Judicature Act 1964 s 24(b) — Rules of Court 2012 O 19 r 1 & O 92 r 4 — Senior Courts Act 1981 ss 20(2)(h) & 21(4)

The plaintiff and the defendant had entered into a time charter party ('the TCP') on 8 January 2016 in which the defendant agreed to time charter its vessel known as 'SILVER MOON' ('the vessel') to the plaintiff. Nevertheless, due to the vessel being unseaworthy and still being off-hire by the defendant for more than seven days, the plaintiff terminated the TCP. Due to the failure of the defendant to provide security in the sum of USD2m, the plaintiff applied for warrant of arrest against the vessel which was granted by the court. The plaintiff had also issued and served notice of arbitration to the defendant. In the present action ('encl 37'), pursuant to O 19 r 1 and O 92 r 4 of the Rules of Court 2012 ('the ROC'), the defendant sought for the orders that the writ in rem and warrant of arrest be struck out. The defendant submitted that the time limit for the plaintiff to file its statement of claim ('SOC') in the present matter expired on 14 March 2016 and the plaintiff had failed, refused and/or neglected to file the same until the date of the filing of the present application. It was also submitted that despite the existence of reference of any dispute under the TCP to arbitration pursuant to cl 67, the plaintiff had taken steps in the High Court proceedings.

Held, dismissing encl 37 with costs:

(1) The issue that both the writ and the warrant of arrest did not make any reference to arbitration was not fatal to the plaintiff's case as the condition precedent to invoke the admiralty jurisdiction of the court was not the arbitration clause, but whether the subject matter fell within the admiralty jurisdiction of the court. In the present case, since the

plaintiff's cause of action was premised on the TCP, then the subject matter fell within s 24(b) of the Courts of Judicature Act 1964 read with ss 20(2)(h) and 21(4) of the Senior Courts Act 1981. Therefore the plaintiff may file the writ and secure the arrest of the vessel premised on the admiralty jurisdiction of the court. However, with the arbitration agreement, the plaintiff may apply to have the arrested vessel as security for its claim in arbitration pursuant to s 11(1)(e) of the Arbitration Act 2005 (see paras 33 & 35).

(2) The defendant's application to invoke O 19 r 1 of the ROC to dismiss the present action was only applicable where the plaintiff was required to serve a SOC. However, since the plaintiff had issued the notice of arbitration, there was no requirement for the plaintiff to serve a SOC in the present action (see para 38).

[Bahasa Malaysia summary

Plaintif dan defendan telah memasuki perjanjian carter masa ('PCM') pada 8 Januari 2016 di mana defendan berjanji untuk carter masa kapalnya yang dikenali sebagai 'SILVER MOON' ('kapal') kepada plaintif. Walau bagaimanapun, akibat kapal tidak layak untuk belayar dan masih dibaiki oleh defendan untuk lebih daripada tujuh hari, plaintif menamatkan PCM. Akibat daripada kegagalan defendan untuk memberikan jaminan dalam jumlah USD2 juta, plaintif memohon untuk waran tahanan terhadap kapal yang mana diberikan oleh mahkamah. Plaintif juga mengeluarkan dan menyerahkan notis timbang tara kepada defendan. Dalam tindakan ini ('lampiran 37'), berdasarkan A 19 k 1 dan A 92 k 4 Kaedah-Kaedah Mahkamah 2012 ('KKM'), defendan memohon untuk perintah bahawa writ *in rem* dan waran tahanan dibatalkan. Defendan berhujah bahawa had masa untuk plaintif memfailkan pernyataan tuntutannya ('PT') dalam perkara ini tamat pada 14 Mac 2016 dan plaintif telah gagal, enggan dan/atau mengabaikan untuk memfailkannya sehingga tarikh pemfailan permohonan ini. Ia juga dihujahkan bahawa meskipun kewujudan rujukan terhadap apa-apa pertikaian di bawah PCM kepada timbang tara berikutan klausa 67, plaintif telah mengambil langkah-langkah di dalam prosiding Mahkamah Tinggi.

Diputuskan, menolak lampiran 37 dengan kos:

(1) Isu di mana kedua-dua writ dan waran tahanan tidak membuat apa-apa rujukan kepada timbang tara adalah tidak serius kepada kes plaintif kerana syarat terdahulu untuk membangkitkan bidang kuasa admiralti mahkamah bukanlah klausa timbang tara, tetapi sama ada perkara tersebut terangkum dalam bidang kuasa admiralti mahkamah. Dalam kes ini, memandangkan kausa tindakan plaintif adalah berdasarkan atas PCM, oleh itu perkara tersebut terangkum dalam s 24(b) Akta Mahkamah Kehakiman 1964 dibaca dengan ss 20(2)(h) dan 21(4)

Senior Courts Act 1981. Oleh itu plaintif boleh failkan writ dan menjamin penahanan kapal tersebut berdasarkan bidang kuasa admiralti mahkamah. Walau bagaimanapun, dengan perjanjian timbang tara, plaintif boleh memohon untuk menjadikan kapal yang ditahan tersebut sebagai jaminan untuk tuntutannya dalam timbang tara berdasarkan s 11(1)(e) Akta Timbang Tara 2005 (lihat perenggan 33 & 35).

(2) Permohonan defendan untuk membangkitkan A 19 k 1 KKM untuk menolak tindakan ini hanya beraplikasi di mana plaintif dikehendaki untuk menyerahkan PT. Walau bagaimanapun, memandangkan plaintif telah mengeluarkan notis timbang tara, tidak terdapat keperluan untuk plaintif menyerahkan PT dalam tindakan ini (lihat perenggan 38).]

Notes

For cases on warrant of arrest, see 2(1) Mallal's Digest (5th Ed, 2015) paras 381–384.

Cases referred to

Tamina Navigation Ltd v The Owner of the Cargo Laden on Board the Ship or Vessel MT 'Swallow' (Newick Shipping Limited, interveners) [2003] MLJU 683; [2003] 8 CLJ 762, HC (refd)
The Evmar [1989] 2 MLJ 460; [1989] 1 SLR 474, HC (refd)
The Vasso [1984] 1 All ER 1126; [1984] 1 Lloyd's Rep 235, CA (refd)

Legislation referred to

Arbitration Act 2005 s 11, 11(1)(e)
Courts of Judicature Act 1964 s 24(b)
Rules of Court 2012 O 19 r 1, O 70, O 92 r 4
Senior Courts Act 1981 [UK] ss 20(2)(h), 21(4)

J Joseph (Joseph & Partners) for the plaintiff.
S Ramesh (Rastam Singh & Co) for the defendant.

Azizah Nawawi J:

APPLICATION

[1] This is an application filed by the defendant under O 19 r 1 and O 92 r 4 of the Rules of Court 2012 for the following orders:

(a) that the writ in rem dated 17 February 2016 be struck out; and

(b) that the warrant of arrest dated 17 February 2016 be struck out.

[2] The grounds of the application are as follows:

(a) that the time limit for the plaintiff to file its statement of claim ('SOC') in this matter expires on 14 March 2016 and the plaintiff has failed, refused and/or neglected to file the same until the date of the filing of this application; and

(b) that despite the existence of reference of any dispute under the time charter party ('TCP dated 8 January 2016') to arbitration pursuant to cl 67, the plaintiff has taken steps in the High Court proceedings.

[3] Having considered the application and the submissions of the parties, this court has dismissed the defendant's application in encl 37 with costs.

THE SALIENT FACTS

[4] The plaintiff is a company incorporated in Singapore with its registered address at Raffles Place, Republic Plaza, Singapore.

[5] The defendant is the registered owner of the vessel, 'SILVER MOON', of Port Klang, Selangor, Malaysia.

[6] The plaintiff and the defendant has entered into the TCP on 8 January 2016, whereby the defendant agreed to time charter the vessel to the plaintiff for a period of three months, with a further six months in charters option ('CP').

[7] The TCP dated 8 January 2016 included an arbitration clause which states as follows:

> Clause 67 Any and all differences and disputes whatsoever nature arising out of this charter *shall be put to arbitration in the city of London* pursuant to laws relating to arbitration there in force ...

[8] The plaintiff had purchased 4000 KL of Marine Gas Oil ('MGO') from a company called Chemoil International Pte Ltd ('Chemoil International') on 12 January 2016 with the intended purpose of shipment on board the vessel, 'SILVER MOON'.

[9] Upon loading a quantity of 3,942.069 KL Cargo of MGO represented by bill of lading No BL-507710–019458 ('the cargo') on board the vessel in the Port of Banyan, Singapore, the terminal issued an electronic bill of lading to the order of Chemoil International. The plaintiff paid for the cargo in full and the bill of lading was endorsed to the order of the plaintiff. Hence the plaintiff is the owner of the cargo on board the vessel.

[10] The plaintiff then gave instructions to the defendant to head to the South Indian Ocean for cargo operations near Male, Maldives.

[11] Despite having received the said instructions from the plaintiff to sail directly to Male, Maldives, the vessel on 8 February 2016 deviated towards a port of refuge, Tanjung Pinang Indonesia and eventually berthed at Johor Port to deal with multiple repair works including but not limited to, oil leakage from the cargo tanks specifically tanks 4S and 5S, seawater ingress to the cargo tank 6P (and other tanks yet to be identified), failure of the vessels generator, flooded cabin rooms (including the cooks cabin, oiler cabin and AB room) and damage to the vessel's hull owing to the port side lifeboat being in contact with the boat davit ('the defects').

[12] In view of the vessel being unseaworthy and as a result of being off-hire for more than seven days, the plaintiff contends that the defendant were in repudiatory breach of the CP. As such, the plaintiff issued a letter to the defendant, accepting the repudiatory breach and terminated the CP with immediate effect on 15 February 2016.

[13] Following the termination of the TCP dated 8 January 2016 and because the cargo had to continue its voyage to its final destination to Male, Maldives, the plaintiff had to charter the MT 'WOOSHIN ACE' (IMO No 9159311) to be ready for ship-to-ship transfer of the cargo.

[14] Vide an email dated 16 February 2016, the plaintiff, through their solicitors Hill Dickinson LLP, reiterating, among others, the termination of the TCP dated 8 January 2016 and demanding security in the sum of USD2m in the form of a bank guarantee.

[15] However, owners persistently failed to cooperate or provide any security for the plaintiff's claim.

[16] Accordingly, the plaintiff invoked the admiralty jurisdiction of this court pursuant to s 24(b) of the Courts of Judicature Act 1964 and ss 20(2)(h) and 21(4) of the Senior Courts Act 1981 and by the warrant of arrest dated 17 February 2016, had the vessel arrested.

[17] On 19 February 2016, the plaintiff issued a demand for security to be furnished for the release of the vessel but the defendant failed to provide the security and the vessel continued to be under arrest by this court.

[18] As the defendant failed to agree or cooperate with the ship-to-ship transfer, the plaintiff applied for an ex parte order to transfer the cargo to the other vessel, MT 'WOOSHIN ACE'. The order was granted on 23 February 2016.

[19] Pursuant to the said order, the discharge and transhipment operations were carried out and concluded on 27 February 2016. The cargo is now on the 'WOOSHIN ACE' and she sailed on 29 February 2016.

[20] The defendant entered an appearance to this action on 29 February 2016.

[21] The plaintiff then issued a notice of arbitration which was served on the defendant on 24 March 2016.

[22] The plaintiff filed this application to strike out the writ and the warrant of arrest on 11 April 2016.

THE FINDINGS OF THE COURT

[23] The defendant's application is premised on O 19 r 1 of the ROC 2012, which reads:

> 1 Default in service of statement of claim
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> Where the plaintiff is required by these Rules to serve a statement of claim on a defendant and he fails to serve on him, the defendant may, after the expiration of the period fixed under these Rules for service of the statement of claim, apply t the Court for an order to dismiss the action, and the Court may by order dismiss the action or make such order on such terms as it thinks just.

[24] The first ground relied by the defendant is that the time limit for the plaintiff to file its SOC in this matter expires on 14 March 2016 and the plaintiff has failed, refused and/or neglected to file the same until the date of the filing of this application.

[25] It is not in dispute that the plaintiff did not file the SOC within the time stipulated. However, the plaintiff submits that the reason why they did not file the SOC is because the dispute between the parties is subject to arbitration under cl 67 of the TCP dated 8 January 2016, and that the plaintiff has initiated arbitration vide their notice dated 24 March 2016. Therefore, the plaintiff contends that there is no requirement for them to serve a SOC in this action.

[26] However, it is the submission of the defendant that the plaintiff has failed to state that the dispute between the parties are be resolved vide arbitration pursuant to cl 67 of the TCP dated 8 January 2016, and that the arrest of the vessel is as an interim measure to preserve the plaintiff's security pending reference to arbitration. The reference to arbitration was not in the writ nor the warrant of arrest.

[27] The defendant relied on the case of *Tamina Navigation Ltd v The Owner of the Cargo Laden on Board the Ship or Vessel MT 'Swallow' (Newick Shipping Limited, interveners)* [2003] MLJU 683; [2003] 8 CLJ 762 that the cause of action premised on arbitration was not pleaded in the writ, and quoted the following passage from the judgment:

> In a discussion about the essential elements of an action in Mustill & Boyd, *Commercial Arbitration* (1982) at p 368, the authors say:
>
> > We submit that the better view is that the Plaintiff must plead and prove both the arbitration agreement and the award: both are essential elements in his cause of action.
>
> If that statement is accurate, as I think it is, then it seems to me that this action arises out of the charterparty.
>
> Reverting to the facts of our case, a perusal of the plaintiff's claim as indorsed on the writ shows nowhere did the plaintiff plead the arbitration agreement. Without having done so, I do not think it can be said that both the essential elements in its cause of action have been pleaded to found an action on the award, let alone the arrest cargo on that basis.

[28] However, the main reason for the dismissal of the writ and the setting aside of the warrant of arrest in *Tamina Navigation Ltd* is that the plaintiff's claim does fall within the admiralty jurisdiction of the court. Therefore, the admiralty jurisdiction of the court was wrongly invoked. The court held at p 783:

> In my judgment, the defendant is correct in its contention that for a claim under s 20(2)(h) the admiralty jurisdiction of the High Court cannot be invoked against cargo. In having done so in this instance, the court was exercising jurisdiction it did not possess. On this ground alone the writ in rem and the warrant of arrest should be set aside.

[29] In the present case, the defendant did not challenge the invoking of the admiralty jurisdiction by the plaintiff. But what the defendant submits is that in both the writ and the warrant of arrest, the plaintiff has taken the position that this court is seized with the jurisdiction to deliberate on the dispute between the parties which has arisen pursuant to the TCP dated 8 January 2016. There is nothing in the writ or the warrant of arrest that states the disputes between the parties be resolved vide arbitration pursuant to cl 67 of

the TCP dated 8 January 2016, and that the arrest of the vessel is as an interim measure to preserve the plaintiff's security pending reference to arbitration.

[30] Therefore, since it is the plaintiff's pleaded case that this court is seized with the jurisdiction to determine the dispute between the parties to the exclusion of arbitration, the defendant concludes that the failure of the plaintiff to file its SOC within the stipulated period justified this application to set aside the writ.

[31] It is not in dispute that there was no reference to arbitration in either the writ or the warrant of arrest. But the reference to arbitration was made through Jeremy Joseph's supplementary affidavit affirmed on 18 February 2016, where the deponent states as follows in paras 3, 4, 5 and 6:

> 3. I make this affidavit in support of the Plaintiff's Writ in Rem dated 17.2.2016 and Affidavit to Lead to Warrant of Arrest affirmed by me on 17.2.2016.
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> 4. The Plaintiff's action falls within the provisions of section 20(2)(h) and 21(4) of the Senior Court Act 1981 which enables SK B&T to enforce their claim in rem against the Vessel.
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> 5. As the Charterparty (cl 67) dated 8.1.2016 (CP) also provides for an arbitration dispute resolution clause, in which any disputes are to be settled in London, an arrest as security for any claim in a foreign arbitration is permissible under the relevant provisions of the Arbitration Act 2005 and the Arbitration Amendment Act 2011.
>
> 6. Notwithstanding the arbitration clause incorporated in the CP and the commencement of London arbitration, I verily believe that this Honourable Court has the power to issue a Warrant of arrest by way of interim remedy t secure the Plaintiff's claim by arrest of the Vessel, pursuant to section 11(1)(e) of the Arbitration Act 2005 (as amended by section 5 Arbitration (Amendment) Act 2011). So far as the relevant arbitral powers are concerned, these are set out in section 11 of the Arbitration Act 2005.

[32] Therefore, through the above affidavit, the plaintiff has taken the position that the plaintiff's application for the arrest of the vessel was made under O 70 of the Rules of Court 2012. Added to that, pursuant to s 11(1)(e) of the Arbitration Act 2005, the arrest of the vessel is for the purpose of security for their claim against the defendant in the arbitration proceedings.

[33] With regards to the issue that both the writ and the warrant of arrest did not make any reference to arbitration, I am of the considered opinion that the same is not fatal to the plaintiff's case, as the condition precedent to invoke the admiralty jurisdiction of this court is not the arbitration clause, but whether the subject matter falls within the admiralty jurisdiction of this court. In the present case, since the plaintiff's cause of action is premised on the TCP dated 8 January 2016, then the subject matter falls within s 24(b) of the Courts of

Judicature Act 1964 read with ss 20(2)(h) and 21(4) of the Senior Courts Act 1981.

[34] In *The Evmar* [1989] 2 MLJ 460; [1989] 1 SLR 474, the court held that:

> I would at the outset state that the mere fact that there is an arbitration clause in a bill of lading does not preclude a plaintiff from instituting an action in rem against the vessel. The only prerequisite to the court's jurisdiction to issue a warrant of arrest is that a writ must have been filed in an action in rem.
>
> This principle was laid down in '*The Vasso*' [1984] 1 Lloyd's Rep 235 where at pp 241–242 Goff LJ stated the following:
>
> > The mere fact that the dispute between the parties falls within the scope of an arbitration agreement entered into between them does not of itself generally preclude one of them from bringing an action. *Accordingly, the mere existence of an arbitration agreement will not of itself prevent a party from issuing a writ, or serving the writ and (in the case of an action in rem) procuring the arrest of the ship, or otherwise proceeding with the action. But the arbitration agreement can, of course, have certain consequences. For example, if an action is begun, the other party may apply for a stay of proceedings.* (Emphasis added.)

[35] Therefore, premised on *The Vasso* [1984] 1 All ER 1126; [1984] 1 Lloyd's Rep 235 case, the plaintiff may file the writ and secure the arrest of the vessel premised on the admiralty jurisdiction of this court. However, with the arbitration agreement, the plaintiff may apply to have the arrested vessel as security for its claim in arbitration in London pursuant to s 11(1)(e) of the Arbitration Act 2005, which reads:

> 11 Arbitration Agreement and interim measure by High Court.
>
> (1) A party may, before or during arbitral proceedings, apply to the High Court for any interim measure and the High Court may make the following order for:
>
> ...
>
> (e) securing the amount in dispute, whether by way of arrest of property or bail or other security pursuant to the admiralty jurisdiction of the High Court ...

[36] Added to that, this application was filed on 11 April 2016, whereas the plaintiff's intention to invoke the arbitration clause was made known through Jeremy Joseph's supplementary affidavit affirmed on 18 February 2016 and the notice of arbitration served on the defendant on 24 March 2016. Therefore, well before the defendant filed this application, the plaintiff has already given notice of arbitration and their intention to secure the arrested vessel as security for its claim in arbitration in London.

[37] Therefore, I am of the considered opinion that based on Jeremy Joseph's supplementary affidavit affirmed on 18 February 2016 and the notice of arbitration served on the defendant on 24 March 2016, the defendant have ample notice that the plaintiff will not be filing a SOC in this action.

[38] The defendant's application to invoke O 19 r 1 of the ROC to dismiss this action is only applicable where the plaintiff is required to serve a statement of claim. However, since the plaintiff has issued the notice of arbitration, there is no requirement for the plaintiff to serve a SOC in this action.

CONCLUSION

[39] Premised on the reasons enumerated above, I am of the considered opinion that there is no merit in this application and the same is dismissed with costs.

Enclosure 37 dismissed with costs.

Reported by Dzulqarnain Ab Fatar